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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 898

JOHN ALAN APPLEMAN and
JEAN G. APPLEMAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Seventh Circuit, reported in 338 F. 2d 729. References to (App. ...) are to the Appendix B filed by respondent in the Court of Appeals of which ten copies have been filed in this Court.

BASIS OF JURISDICTION.

The judgment of the Court of Appeals was entered November 19, 1964. Stay of mandate was entered December 1, 1964. The opinion of the Court of Appeals appears in the Appendix to this petition.

Jurisdiction is invoked under Title 28, United States Code, § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is the rule of Matheson v. Commissioner, C. A. 2, 54 F. 2d 537, that a casualty loss be unusual, sudden *or* unexpected erroneous in that those characteristics must all be present before any loss can be a casualty? In other words, is a loss caused by the bite of an insect prevented from being a casualty loss, where it is sudden, if it is foreseeable although unusual?

2. Following this, does the fact that the mechanism of loss, such as an insect infestation, reaches epidemic proportions within a given geographical area, in any way change the ordinary rules of law which apply in determining whether or not a casualty loss has occurred, and is such a loss excluded from being a casualty loss merely because once the forces of destruction have been set into motion the loss can be anticipated?

3. Can a loss suffered within one month of an insect bite be "sudden" or are the cases of E. G. Kilroe, 32 T. C. 1304, Rosenberg v. Commissioner, C. A. 8, 198 F. 2d 46 and similar termite cases erroneous in their statements that "suddenness" is relative and that losses within time spans of one to six months can be casualty losses?

4. Is a jury wrong as a matter of law in finding that the loss of valuable trees from a virus which enters such trees

through the bite of infected leafhoppers, causing the death of such trees in thirty days from the time of the bite, constitutes a casualty loss—assuming there was no way to prevent such infestation, there was no cure for the virus, and no way to avoid the deaths of such trees—it being undisputed that economic loss resulted to the taxpayers?

STATUTORY QUESTIONS.

The pertinent statute involved is the Internal Revenue Code of 1954 with particular reference to § 165 (a) and (c):

(a) General Rule—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

(c) Limitation on Losses of Individuals—In the case of an individual, the deduction under subsection (a) shall be limited to—

(1) losses incurred in a trade or business; • • •

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty • • •.

STATEMENT OF THE CASE.

The facts of the case as set forth by the Court of Appeals are as follows; the bracketed materials being supplements added for clarity:

"The government prosecutes this appeal from a judgment for $1,642.68, with interest, entered against it by the District Court in an action brought [under Title 28, United States Code, § 1340] by John Alan Appleman and Jean G. Appleman [hereinafter referred to as taxpayers] to recover alleged overpayments of federal income taxes for the taxable years 1956, 1957, and 1958. The taxpayers had

taken deductions on their income tax returns for those years for depreciation in value of their property as a result of the loss of elm trees occasioned by phloem necrosis. The deductions were disallowed, the taxpayers paid the additional tax resulting from the disallowance, and their claims for refund thereof were rejected. Their action for recovery of the amounts of the additional tax paid was tried by a jury, which returned a verdict favorable to the taxpayers. The District Court denied the government's motion for judgment notwithstanding the verdict and entered judgment in accordance with the verdict. The government's appeal is predicated upon the contention that the court erred in denying its motion. [Since the government did not ask for a new trial, it concedes that the taxpayers are entitled to the deduction unless these were not casualty losses as a matter of law]. * * *

"It is not disputed by the government that the evidence warranted findings by the jury that the taxpayers sustained a depreciation in the value of their property due to the death of elm trees located thereon, in the amount as fixed by the verdict for each of the years involved. And the government does not dispute that the evidence supports the conclusion that the death of the trees, and the resulting loss was due to phloem necrosis. * * *

"The record in the instant case discloses that in 1949 or 1950 the taxpayers, husband and wife, acquired a twenty-five acre tract of land approximately four miles north and east of Urbana, Champaign County, Illinois [to be used both for a residence and for a business since the taxpayer had his law office there (App. 38)]. It had a number of elm trees growing thereon and the taxpayers planted more. Phloem necrosis first appeared in Champaign County, Illinois, in the early 1950's. It is a virus which enters the cells of the phloem of a tree, the woody connective tissue of the tree just beneath the bark. The virus is carried by an insect called a leaf hopper which

after feeding on an infected tree, sucking up the sap, moves on to a healthy tree into which it injects the virus while feeding thereon. During 1956 the taxpayers lost forty-two trees to the disease; in 1957, ten trees; and in 1958, thirty-nine more.

"There is testimony in the record from which the jury could have concluded that the bite of but one leaf hopper carrying the virus is sufficient to infect an elm tree; that the infected tree inevitably dies from the disease, usually in about a month; that there was nothing which a property owner could do to save the elm tree once it was infected. Spraying proved ineffective in preventing the disease, except under laboratory conditions. The University of Illinois (located at Champaign-Urbana), the municipalities of Urbana and Champaign, and private property owners, conducted spraying programs but lost their elm trees. Prior to 1956 the taxpayers had been spraying but discontinued when informed it would do no good. * * *"

This virus swept through those communities during the years 1956-1958 killing about ninety-eight percent of all of the elm trees, including, as noted, those of the taxpayers.

ARGUMENT.

This issue is a matter of first impression in this Court —not only as to the precise casualty called "phloem necrosis"—but as to analogous losses. The Seventh Circuit has now added to the traditional tests of a casualty, that of the conjunctive requirement of suddenness and unexpectedness thus rendering it squarely in conflict with the Second[1], Fifth[2], and Eighth[3] Circuits, and, when views so divergent represent *stare decisis* in the several Circuits, it is important that this Court resolve the conflict.

Furthermore, in the course of adding this concurrent characteristic of unexpectedness, the court has so narrowed its meaning so as to distort the law of casualty. In addition, during the past few years, the Internal Revenue Service has flopped from nonacquiescence to acquiescence to nonacquiescence in termite cases, cases which both sides originally regarded as helpful in the determination of what constituted casualty losses similar to the losses caused by phloem necrosis.

Accordingly, it will not only be helpful to the courts, but to the government and to taxpayers, for this Court to determine whether an additional requirement of concurrent characteristics should be superimposed upon the existing tests for a casualty loss. The losses involved in such cases as these are too small to allow the average taxpayer to defend himself against the flip-flopping rulings of the Internal Revenue Service. Most of the taxpayers are not lawyers who can get the legal work done "wholesale" by delegating it to their offspring. And

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[1] Matheson v. Commissioner, C. A. 2, 54 F. 2d 537 at 539.

[2] Levy v. Commissioner, C. A. 5, 212 F. 2d 552 at 555.

[3] Rosenberg v. Commissioner, C. A. 8, 198 F. 2d 46 at 49.

yet, while the amount involved in such controversies is small, the principle is great.

It is submitted that the Court of Appeals has confused taxation law and tort law—and that the Palsgraf rule of "foreseeability" has no place in this area. Indeed, as will be developed, a logical extension of the instant decision could automatically blot out ninety percent of the presently recognized and unchallenged casualties of the "ejusdem generis" type.

I.

The court erred in requiring a loss which is sudden and unusual to be unexpected and in requiring a loss to be unforeseeable before it can be unexpected, thus eliminating all losses reaching epidemic proportions.

A.

A loss to be covered as a casualty loss need not always be unexpected, since the tests for a casualty loss are in the disjunctive.

An important area of disagreement between the circuits as to practical definition of "other casualty" appears to have developed with the decision of the Seventh Circuit in Appleman v. United States. For years, the standard definition of "other casualty" has been that of Matheson v. Commissioner, C. A. 2, 54 F. 2d 537 at 539. That court interpreted the statute as placing the tests of a casualty loss in the disjunctive, sudden, unexpected *or* unusual. It therefore has not been necessary that the loss fit all three tests. And this test had become so common that *Black's Law Dictionary* (4th Ed., 1951), adopted it as part of its definition of casualty:

> "Accident; event due to sudden, unexpected or unusual cause; event not to be foreseen or guarded

against; inevitable accident; misfortune or mishap; that which comes by chance or without design. A loss from such an event or cause; as by fire, shipwreck, lightning, etc. * * *

"Chance; accident; contingency; also that which comes without design or without being foreseen. * * *"

But the court in this case was obviously requiring the presence of all three characteristics (338 F. 2d 730, 731). "Fire and shipwreck are undesigned, sudden *and* unexpected events" (emphasis added). And here the court concluding, erroneously, at (338 F. 2d 732), that the events were not unexpected, immediately held that the loss of the trees was not a casualty.

B.

A loss, to be unexpected, need not be totally unforeseeable since all losses can be anticipated by anyone with a little imagination.

As a matter of fact, the losses in this case probably do meet all three tests since they were unexpected when the property was acquired and when the trees were planted, they occurred with reasonable suddenness, and there was no way in which the losses could have been avoided by the taxpayers. But the court here appears to have been confused over the meaning of the word "unexpected". It is not necessary that the instrumentalities of damage be unique in character nor that they originate for the first time in the case under consideration. It can be anticipated that droughts will occur, floods are not uncommon; subsidence often follows mining operations or other activities which weaken the subsoil; frost and freezing are not unknown. Thus, to be unexpected, it is not necessary for a casualty to be totally "unforeseeable" (338 F. 2d 730) but only that it be unlikely to happen.

The government predicts the occurrence of major hurricanes, naming them annually in alphabetical order by deceptively feminine names. The course of such storms may be known days or even weeks in advance. Yet the knowledge that such a hurricane is moving toward him does not diminish the casualty loss of a landowner whose home it lifts from its foundations. A home may be erected in a "tornado path" where violent storms have passed with great frequency. It may be anticipated that misfortune may strike in the form of violent winds, but this anticipation does not expunge the loss which he sustains nor diminish in any way the deductibility of it when tax-time rolls around. In most casualty losses, there is some forewarning—hours, days, weeks, perhaps even years; but if the destructive force is not avoidable and the taxpayer is not reckless in protecting his property, there is a deductible casualty loss.

The mere fact that vandalism is known to occur does not prevent such damage from constituting a casualty loss, Burrell E. Davis, 34 T. C. 586. Does it matter whether the vandals are of human or insect origin? The economic loss to the taxpayer is still the same. When a plane flies at speeds greater than that of sound, it is known that a sonic boom will result which may cause damage to property. Indeed the result is so common that the Chicago Daily News in announcing a three month series of training flights which would produce sonic booms said "property damage, particularly to window panes is anticipated" (January 2, 1965, p. 2 col. 3). Yet even though this is a usual effect of a known cause, it is still deductible, Rev. Rul. 59-344. When a person drives a car, he takes his life into his own hands. The National Safety Council says that the normal driver is involved in an accident serious enough to require reporting to the authorities once every five years. And the massacre on the highways during the holiday season is constantly be-

ing mentioned. Yet despite the fact that such accidents are expected, this Court has allowed them as casualty losses, Helvering v. Owens, 305 U. S. 468.

C.

Despite the fact that once a disaster strikes an area, losses can be anticipated, losses which previously were casualty losses continue to be such.

Moreover, apparently the court felt that once a disaster struck an area, the resulting losses are not casualty losses since they can be anticipated; at least they are not casualty losses unless the original strike and the resulting kill all occurred more or less simultaneously. Yet this is contrary to prevailing tax law. In Harry Johnston Grant, 30 B. T. A. 1028, Acq. XIII-2, C. B. 8, the taxpayer's property sank over a period of four to five years. The taxpayer and his neighbors (pp. 1030, 1031), became alarmed after they discovered that there was a break in the earth. Its continuing progress caused them to hire engineers to attempt to ascertain the cause and provide a remedy. Efforts were made (pp. 1032, 1033) to drain the soil but the sinking continued. Yet despite the fact that the damage occurred over a five year period, despite the fact that the damage was anticipated during said period, despite the facts that frantic efforts were made to prevent the damage, the court at pp. 1034, 1035, held the loss to be a casualty loss. And in Buttram v. Jones, D. C. Okla., 87 F. Supp. 322 at 324, it was held that trees destroyed by a drought lasting over the major part of a year were casualty losses. Surely, once the drought began the taxpayer could have anticipated the disastrous results; perhaps there was even town meetings to discuss the problem. In United States v. Barret, C. A. 5, 202 F. 2d 804 at 805, 806, there was a severe freeze occurring over a two month period. The trees did not die immediately from this long freeze.

Instead the owner attempted for two years to save them before he finally had them removed. Yet despite the fact that he certainly must have anticipated their loss with sorrow, this loss was still held to be a casualty loss. Moreover, in Oregon Mesabi Corporation, 39 B. T. A. 1033 at 1036-1038, appeal dismissed 109 F. 2d 1024, fire damaged the taxpayer's trees in 1933. However they retained their value as timber if they could be sold quickly. Some were, but, due to the depressed market, many were left standing. These were attacked by insects as expected and slowly destroyed. This the court held was a casualty loss, to be deducted not when the fire occurred but when the trees actually became worthless. A similar case is Nourse v. Birmingham, D. C. Iowa, 73 F. Supp. 70 at 70, 71. A sudden blizzard occurred on November 11, 1940, following an unseasonably warm fall. Many of the taxpayer's trees forming a windbreak were killed. But no injury was apparent until the trees failed to bloom in the spring of 1941. The court held that the casualty loss occurred not at the time of the blizzard but in 1941. Surely once the blizzard had struck, the loss was expected.

Perhaps the clearest case to indicate that the fact a loss can be anticipated once the destructive forces are set in play does not prevent that loss from being "unexpected" is Charles Gutwirth, 40 T. C. 666 at 673-675, 679, 680. Lipschutz and his wife had a beautiful home in Antwerp, Belgium. They fled to the United States before the Second World War and the house was occupied by the Germans. Later the British soldiers took over its occupation. Lipschutz regained legal possession of the house in January 1946 when he started proceedings to collect rent; these he later won. When the house was examined in June, 1946 after the departure of the British, it was found to have been badly damaged by theft and vandalism. Citing Burrel E. Davis, 34 T. C. 586, a case involving vandalism, the court held that this was a casualty loss. Yet certainly it would

be expected once war broke out, soldiers occupied homes, and police order broke down, that such vandalism would occur.

D.

The court erred in holding that as a matter of law, a sudden loss caused by disease carried by insects is never a casualty loss.

The court in this case stated at (338 F. 2d 731) that the most analagous decision was that of Burns v. United States, D. C. Ohio, 174 F. Supp. 203, affirmed per curiam, 284 F. 2d 436, a case involving Dutch elm fungus. Even assuming for a moment that the Burns decision was correct, it is difficult to see the similarity between the two factual situations. The Dutch elm disorder is a fungus, not a quickly disseminating virus; the Dutch elm fungus is not necessarily fatal, phloem necrosis is. Moreover Dutch elm disease is quickly recognizable, and the landowner can cut out the infected area and save the tree, whereas, since the whole tree is immediately infected by the one fatal bite, phloem necrosis cannot be arrested by amputations. Furthermore, spraying is one hundred percent effective against the Dutch elm fungus (Abst. 82) whereas no spraying program can arrest phloem necrosis. Added to this is the fact that unlike the Dutch elm fungus, phloem necrosis needs only a month in which to kill a tree.

It is possible that in considering whether the loss was unexpected, the Court of Appeals in this case and the court in the Burns case both were confused by the government's emphasizing the term disease. In a footnote, on page 731, this court quoted the Burns case as saying: "loss occasioned by disease, however contracted, is not a casualty within the meaning of the statute." This statement is erroneous. Even the death of animals from

disease has been held a casualty or business loss; the death of sheep from disease was held deductible more than twenty years ago, Logan W. Marshall v. Commissioner, Memo. Op. February 14, 1941, Doc. 99424. Nor is it logical that death by disease should be automatically excluded as a casualty loss. Disease to some degree may be an ordinary part of life, but sweeping losses due to epidemics are no more expected than are losses due to hurricanes, tornadoes, floods and automobile accidents.

Moreover, what is disease? A medical dictionary defines it as "a morbid change in any of the tissues or an abnormal state of the body as a whole." If lightning splits a tree, the tree dies because of a morbid change in tissue, induced in part by the direct traumatic effect of the lightning and in part by the inability of the cells to perform their usual functions. The lightning however remains the cause of the casualty. Similarly, a tree which is killed by a severe and sudden frost dies from disease; so does a tree dying from drouth since in both instances again the tree dies because of a morbid change in tissue. Yet these are casualty losses. Buttram v. Jones, D. C. Okl., 87 F. Supp. 322 at 324 (drought); Winters, Jr. v. United States, 1 A. F. T. R. 2d 644 (drought); Bessie Knapp, 23 T. C. 716 at 718 (freeze); Robert H. Montgomery, 1947 T. C. Memo. (P-H) 66 at 68; United States v. Barret, C. A. 5, 202 F. 2d 804 at 805, 806 (freeze); Nourse v. Birmingham, D. C. Iowa, 73 F. Supp. 70 at 70, 71 (sudden blizzard).

The loss here was not foreseen. Indeed when in 1952 one of the experts, Mr. Bennett, was doing his college work at the University of Illinois, a very center of study of plant pathology, only four years before this general infestation began, phloem necrosis was unknown. Certainly then when the land was purchased in 1950, when the trees were planted and cultivated, these losses were indeed unexpected. One expects trees to grow and live

a natural span of years, not to die in their prime. It is true that one might expect one or two trees to die of disease early in their life span but then a few will live much longer than expected to maintain the average. So it is indeed unexpected and unusual for all of one's elm trees to be swept away at one time, killed by the bite of an insect.

E.

The fact that these losses could not be prevented or guarded against indicates that they are casualty losses.

The taxpayer had stated in his brief when discussing the meaning of the terms unusual or unexpected that "if a definite economic loss occurs to the individual as a result of forces beyond his control, and not due to his own fault, the casualty which was contemplated by Congress would seem to occur." The Court of Appeals criticized this statement at 338 F. 2d 731, 732. Yet United States v. Rogers, C. A. 9, 120 F. 2d 244, 246, when quoting the dictionary definitions of casualty had given among those definitions: "Inevitable accident. Unforeseen circumstances, not to be guarded against by human agency and in which man takes no part." And these definitions in Rogers have been quoted by other cases including that of Stowers v. United States, D. C. Miss., 169 F. Supp. 246 at 248. In the latter case, the taxpayers built a home on the bluff overlooking the Mississippi River. It was widely known that the loess soil composing these bluffs made an excellent foundation unless it became too saturated. The town failed to provide for adequate drainage and, after such saturation had occurred, a huge part of the bluff sloughed off. Apparently, no sudden and violent rain was responsible for this. The resulting loss in value to the taxpayer's home was held to be a casualty loss.

II.

The jury's determination that the loss was sudden should not be overturned since it was not incorrect as a matter of law.

There was much discussion in the briefs for the appellate court but little in the court's opinion as to whether the loss was sudden. Since the government never requested a new trial, the evidence must be taken in the light most favorable to the taxpayers. And the evidence which went to the jury was capable of showing, as the appellate court acknowledged, that the loss occurred within one month of the fatal bite. Thus the question is whether the death of a tree within one month of such a bite is sufficiently sudden to constitute a casualty.

While it is true that the term "suddenness" is comparative and gives rise to an issue of fact, E. G. Kilroe, 32 T. C. 1304 at 1306; Rosenberg v. Commissioner, C. A. 8, 198 F. 2d 46 at 50, periods of much greater length than one month have been held to be "sudden". In termite cases, for example, losses have occurred through a period of one month to one and one-half years. Rosenberg v. Commissioner, C. A. 8, 198 F. 2d 46 at 47, 50, 51 (about six months); Shopmaker v. United States, D. C. Mo., 119 F. Supp. 705 at 706 (about six months); Buist v. United States, D. C. S. C. 164 F. Supp. 218 at 220 (six to eight months); E. G. Kilroe, 32 T. C. 1304 at 1309 (about three months); Henry F. Cate, Jr., 21 T. C. M. 1146 at 1147, 1148 (six months); and Alan M. Winsor, 18 T. C. M. 383 at 384-386 affirmed Winsor v. Commissioner, C. A. 1, 278 F. 2d 634 (one and one-half years). Indeed the government acquiesced in the Buist case, saying in part; Rev. Rul. 59-277, C. B. 1959-2, 73:

> "In *George L. Buist et ux. v. United States,* 164 Fed. Supp. 218, the United States District Court for the Eastern District of South Carolina held that dam-

ages to a house caused by an infestation of termites sometime between September of one year and June of the succeeding year constituted a deductible casualty loss under Section 165 of the Internal Revenue Code of 1954. Following the decisions of ***Martin A. Rosenberg v. Commissioner,*** 198 Fed. (2d) 46, and ***Joseph Shopmaker et al. v. United States,*** the District Court found that the requisite degree of 'suddenness', a cardinal element in these decisions, had been established. It distinguished, however, the cases of ***United States v. Betty Rogers et al.,*** 120 Fed. (2d) 244; ***Charles J. Fay et al. v. Helvering,*** 120 Fed. (2d) 253; and ***Leslie C. Dodge et ux. v. Commissioner,*** 25 T. C. 1022. In the latter cases the termite infestation and subsequent damage occurred over periods of several years. The Internal Revenue Service will follow the rule of the ***Buist, Rosenberg,*** and ***Shopmaker*** decisions only in those cases where the facts are substantially the same."

But after the jury had returned its verdict for the taxpayers, and Judge Casper Platt had denied the government's motion for judgment notwithstanding the verdict, the Internal Revenue Service suddenly withdrew that acquiescence, filing a non-acquiescence which it then cited in its appellate brief as authority for a reversal. This of course seems unjust. Cases on appeal are supposed to be handled upon the same facts and law which were presented to the trial court. This is no sporting contest in which one of the parties has the right to change the "rules of the game" at its whim - - - in this instance, between the time of the trial and the determination of this appeal. Even the government should be required to act with reasonable consistency, and the utilization of its own "post-decision" action to influence a Court does not seem consistent with the standards one is entitled to expect of his government.

The reasoning followed by the majority rule, and heretofore by the government, in termite cases is confirmed in many other situations. For example, drought damage does not occur instantaneously. It may take a period of weeks or even of months to cause the death of trees, shrubs, or other damage to them, but drought damage does constitute a casualty loss. Rev. Rul. 54-85, C. B. 1954-1, 58; Rev. Rul. 58-180, C. B. 1958-1, 153; letter to T. Coleman Andrews dated February 2, 1954 to Hon. Thomas C. Hennings, Jr.; Winters, Jr. v. United States, 1 A. F. T. R. (2d) 644; Buttram v. Jones, D. C. Okl., 87 F. Supp. 322 at 324. Land has subsided, walls collapsed, and buildings fallen down as a result of action which has persisted over a long period of time, and such have been held to be casualty losses; Horace S. Clark, 39 B. T. A. 329 at 329, 330 (subsidence from mining operations); Harry Johnston Grant, 30 B. T. A. 1028 at 1029, 1030, 1034, 1035 acq. XIII-2 C. B. 8 (gradual subsidence of land near taxpayer); Delbert P. Hesler, 13 T. C. M. 972 (excessive six weeks' rainfall causing sinking of earth and cracking of walls and ceilings); Ferris v. United States, 9 A. F. T. R. 2d 1414 (wall collapsing from subsoil hydraulic action after 18 days of heavy rain). And upon flood damage generally, see Ferguson v. Commissioner, C. A. 10, 59 F. 2d 893.

Since, therefore, it is not contrary to law that a loss occurring within the period of one month be a casualty loss, it was proper for the jury both to determine the length of time involved in the loss and whether this length of time was sufficiently sudden to constitute a casualty loss. When such has been done, its determination should not lightly be discarded. As stated by the late Mr. Justice Norman Jones in People v. Hanisch, 361 Ill. 465 at 468, 198 N. E. 220:

> "The jury, as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of time by the judges

would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

III.

In conclusion, the court's definition would prevent any loss normally conceived of as casualty loss from being included under the statute.

If the word "unexpected" is allowed to retain the definition given to it by the Court of Appeals in this case, then what can be "other casualty"? Droughts, history tells us, occur; indeed we even know in what parts of the country they can be anticipated or cannot be anticipated. As to floods, folks in Shawneetown, Cairo, or Natchez-under-the-Hill, and all other cities along the Mississippi River, could not say they expected to pass their life without suffering damage from at least one flood. Since statisticians have stated that a normal driver of an automobile will be involved in an accident every five years, it would appear under this ruling that this Court was mistaken in holding that an automobile accident can be an "other casualty". And with the advent of the jet plane, damage from sonic booms can be expected. We must therefore conclude that the government was mistaken in acknowledging that such is a casualty loss.

It is fortunate that all storms, including hurricanes and tornadoes, are specifically mentioned in the statute, else they could not be covered under such a definition. A hurricane is not only predicted by the Weather Bureau; it is known days in advance where it will hit and the approximate amount of damage it will cause. Such damage cannot be said to be unexpected. Similarly, the residents of California had been warned that destruction of their

property by forest fire was likely, days before the outbreak of those terrible fires of the summer of 1964. Those who had houses in the area must have anticipated their loss even if they hoped for a miraculous deliverance. But these are all casualty losses. It has been stated by all the cases that the meaning of the term "other casualty" is discovered by applying *ejusdem generis* looking at the nature of "fire, storm and shipwreck." It would then appear strange if, because of the definition now applied to "other casualty", losses due to fire or storm could not be casualties save for the fact that they are specifically enumerated in the statute.

Moreover, according to this case, the citizens of Anchorage, Alaska, from this point forward, will have no casualty deduction should there be a repetition of those terrible earthquakes of 1964; they would be foreseeable. The same would be true in California, especially in the southern part, which is legendary for its earthquakes. Similarly, memories of prior landslides in Los Angeles would prevent any future ones from being casualty losses. Yet while it is not wholly unexpected, it is most inconvenient for one's house to slide into a neighbor's backyard. In Hawaii, there is always a fear, because of past experiences, that a volcano will erupt sending lava to destroy neighboring villages. This could be expected, therefore it would not be a casualty loss. Similarly, every child has heard of the "seventeen-year locust," and the terrible damage brought by its visitations. Yet, under this case, the destruction caused by these swarms could not be deducted as a casualty loss since their flights can be predicted by scientists. And early in December of 1964, New York had a terrible storm. Power lines were down all over. The governor issued a warning that everyone should stay indoors, the danger of electrocution being so great. Then, it could be expected that some animals wandering in a pasture would be electrocuted. So if this

definition of casualty is correct, we must assume that their deaths would not be casualty losses.

Indeed we might ask under the court's definition, what is unexpected, what is unforeseeable? If it is true that there "is nothing new under the sun", anyone with a knowledge of past events can foresee the possibility of any disaster occurring to him. He will not anticipate that it will be but he can foresee that possibility. With this decision as a part of our *stare decisis*, nothing which has ever occurred before can be a future casualty under the "other casualty" clause. We do not feel that this was the intent of Congress in passing this section. Therefore, we ask this Court to accept this controversy to clarify the meaning and nature of an "other casualty".

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari issue to review the judgment and orders of the Court of Appeals of the Seventh Circuit. heretofore entered in this cause.

Respectfully submitted,

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JOHN ALAN APPLEMAN,
Of Counsel.

Proof of Service.

I, John Alan Appleman, one of the attorneys for John Alan Appleman and Jean G. Appleman, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of February, 1965, I served copies of the foregoing Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit on the United States by mailing copies in duly addressed envelopes, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C., 20530 and to J. Edward Shillingburg, Esq., Department of Justice, Washington, D. C. 20530.

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In the
United States Court of Appeals
For the Seventh Circuit.

September Term, 1964—September Session, 1964.

No. 14592

John Alan Appleman and
Jean G. Appleman,
Plaintiffs-Appellees,
vs.
United States of America,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois.

November 19, 1964.

Before Castle, Kiley and Swygert, *Circuit Judges*.

Castle, *Circuit Judge*. The government prosecutes this appeal from a judgment for $1,642.68, with interest, entered against it by the District Court in an action brought by John Alan Appleman and Jean G. Appleman[1] to recover alleged overpayments of federal income taxes for the taxable years 1956, 1957, and 1958. The taxpayers had taken deductions on their income tax returns for those years for depreciation in value of their property as a result of the loss of elm trees occasioned by phloem necrosis.[2] The deductions were disallowed, the taxpayers

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[1] Hereinafter referred to as taxpayers.

[2] "Phloem" is a complex tissue in the vascular system of higher plants consisting mainly of sieve tubes and companion cells and usually also of fibre and parenchyma cells. It is part of the conductive tissue conveying the materials nourishing the plant. "Necrosis" is the death of living tissue; the death of plant tissue caused by fungi or other factors.

paid the additional tax resulting from the disallowance, and their claims for refund thereof were rejected. Their action for recovery of the amounts of the additional tax paid was tried by a jury, which returned a verdict favorable to the taxpayers. The District Court denied the government's motion for judgment notwithstanding the verdict and entered judgment in accordance with the verdict. The government's appeal is predicated upon the contention that the court erred in denying its motion.

Our review of the denial of such a motion is limited to a determination of whether the evidence warranted submission of the case to the jury. Such motion raises a question of law as to whether the evidence, together with all reasonable inferences which may be drawn therefrom, when viewed in the light most favorable to the party against whom the motion is directed, is insufficient to support the verdict. *Lambie v. Tibbits*, 7 Cir., 267 F. 2d 902, 903; *Lescher Building Service, Inc. v. Local Union No. 133, etc.*, 7 Cir., 310 F. 2d 331, 333. If there is any evidence which, if believed by the jury, warranted the verdict the judgment in favor of the taxpayers must stand. But if the taxpayers failed to present proof which would warrant a favorable finding as to an element requisite to the establishment of their cause of action it was error to deny the government's motion. Cf. *Gordon v. Illinois Bell Telephone Company*, 7 Cir., 330 F. 2d 103, 106.

It is not disputed by the government that the evidence warranted findings by the jury that the taxpayers sustained a depreciation in the value of their property due to the death of elm trees located thereon, in the amount as fixed by the verdict for each of the years involved. And the government does not dispute that the evidence supports the conclusion that the death of the trees, and the resulting loss, was due to phloem necrosis. The basic contested issue precipitated by the government's appeal is

whether the loss so sustained by the taxpayers is a "casualty" within the purview of Section 165 (c) (3) of the Internal Revenue Code of 1954 (26 U. S. C. A., § 165 (c) (3)) which authorizes a tax deduction by an individual for an uncompensated loss of property not connected with a trade or business, and sustained during the taxable year, if such loss:

> ". . . arise[s] from fire, storm, shipwreck, or other casualty, or from theft. . . ."

In the absence of any congressional explanation of the phrase "or other casualty" as used in the above section, the courts have turned to the traditional rule of *ejusdem generis* as an intrinsic guide to the construction and application of the term. *Rosenberg v. Commissioner*, 8 Cir., 198 F. 2d 46, 50; *United States v. Rogers*, 9 Cir., 122 F. 2d 485. "Other casualty" is an omnibus phrase. And as used in Section 165 (c) (3) it follows an enumeration of specific categories of casualty. Absent some indication of congressional intent to the contrary the phrase must be taken as restricted to things of the same kind or quality as those specifically enumerated. *United States v. Stever*, 222 U. S. 167, 174. Among characteristics of the specific casualties enumerated in the section are suddenness and unforeseeability of the occurrence. Fire and shipwreck are undesigned, sudden and unexpected events. While storms are to a degree predictable the factors of their violence and the particular site of loss or damage are uncertain.

We have reviewed and considered the decisions cited by the taxpayer and those cited by the government in which the "other casualty" provision of the section has been involved. For the most part they represent determinations made with reference to one or more of the factors above mentioned.[3] And the elements or factors,

[3] The most analogous of the cases appears to be *Burns v. United States* (N. D. Ohio, E. D.), 174 F. Supp. 203, affirmed *per curiam*

or absence thereof, which have been deemed controlling and determinative of the result reached, and the relative weight accorded them as tests of a "casualty" loss under the statute, have necessarily varied according to the inherent differences in the nature of the event or occurrence relied upon as constituting a casualty and the character of the subject matter or property upon which it operated.

The record in the instant case discloses that in 1949 or 1950 the taxpayers, husband and wife, acquired a twenty-five acre tract of land approximately four miles north and east of Urbana, Champaign County, Illinois. It had a number of elm trees growing thereon and the taxpayers planted more. Phloem necrosis first appeared in Champaign County, Illinois, in the early 1950's. It is a virus which enters the cells of the phloem of a tree, the woody connective tissue of the tree just beneath the bark. The virus is carried by an insect called a leaf hopper which after feeding on an infected tree, sucking up the sap, moves on to a healthy tree into which it injects the virus while feeding thereon. During 1956 the taxpayers lost forty-two trees to the disease; in 1957, ten trees; and in 1958, thirty-nine more.

There is testimony in the record from which the jury could have concluded that the bite of but one leaf hopper carrying the virus is sufficient to infect an elm tree; that the infected tree inevitably dies from the disease, usually in about a month; that there was nothing which a property owner could do to save the elm tree once it was infected. Spraying proved ineffective in preventing the disease, ex-

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(8 Cir.), 284 F. 2d 436, where it was held that the loss of elm trees in consequence of the Dutch Elm Disease was not a casualty within the meaning of the comparable provision of the Internal Revenue Code of 1939. In that case it is indicated that the progressive nature of the disease disqualified the resulting loss on the ground of lack of suddenness but the district court went on to declare: "loss occasioned by disease, however contracted, is not a casualty within the meaning of the statute".

cept under laboratory conditions. The University of Illinois (located at Champaign-Urbana), the municipalities of Urbana and Champaign, and private property owners, conducted spraying programs but lost their elm trees. Prior to 1956 the taxpayers had been spraying but discontinued when informed it would do no good.

But the record also discloses that the taxpayers' expert witnesses testified that from the early 1950's the serious nature of the disease was obvious to any person living in the area; that during the years 1956, 1957 and 1958 the infection of elm trees was an ordinary and usual event—a common experience—in Champaign County, the situs of the property involved and where the taxpayers resided. One of the taxpayers testified that it was common knowledge a disease was attacking the elm trees throughout Champaign County in the 1950's and that the disease had been the subject of a town meeting discussion before the taxpayers took up residence upon the tract involved.

Taxpayers' contention that if a definite economic loss occurs to the individual as a result of forces beyond his control, and not due to his fault, a casualty such as contemplated by Congress has occurred overlooks the factor of "unexpectedness"—a prerequisite element implied in the statute—which arises from the limitation upon the scope of the phrase "other casualty" by reason of its association with fire, storm and shipwreck losses. The record demonstrates that during the years involved loss of elm trees from phloem necrosis was to be expected. It was a common occurrence. Between fifteen and seventeen thousand elms were lost in the area—over ninety-eight percent of the elms in the community. The disease existed in the area and the evidence is that no practical means existed to effectively protect a tree from infection. Thus, apart from the question whether death within a month from infection is relatively "sudden" it is apparent the element of unexpectedness was entirely lacking, and as a

matter of law the death of the taxpayers' elms during 1956, 1957 and 1958 was not a casualty within the meaning of Section 165 (c) (3). The District Court erred in denying the government's motion for judgment notwithstanding the verdict. The judgment order of the District Court is therefore reversed.

Reversed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 898

JOHN ALAN APPLEMAN and JEAN G. APPLEMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. i-vi)[1] is reported at 338 F. 2d 729.

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[1] "Pet. App." references are to the opinion of the Court of Appeals set forth in the appendix to the petition; "R." references are to the separately bound Appendix to the brief of the Government filed in the court below.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1964 (Pet. App. i). The petition for a writ of certiorari was filed on February 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the losses sustained by the petitioners by reason of the death of their elm trees from the disease phloem necrosis were deductible casualty losses within the meaning of Section 165(c) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 165. LOSSES.
>
> (a) *General Rule.*—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.
>
> * * * *
>
> (c) *Limitation on Losses of Individuals.*—In the case of an individual, the deduction under subsection (a) shall be limited to—
>
> (1) losses incurred in a trade or business;
>
> (2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and
>
> (3) losses of property not connected with a trade or business, if such losses arise from

> fire, storm, shipwreck, or other casualty, or from theft. No loss described in this paragraph shall be allowed if, at the time of the filing of the return, such loss has been claimed for estate tax purposes in the estate tax return.
>
> * * * *

(26 U.S.C. 1958 ed., Sec. 165.)

STATEMENT

On their income tax returns for the years 1956, 1957, and 1958, the petitioners, husband and wife, deducted amounts reflecting the depreciation in value of their property by reason of the death in each of those years of a number of elm trees from the disease phloem necrosis (Pet. App. i, iv). On this property, a 25-acre tract located about four miles from Urbana, Champaign County, Illinois, the petitioners had their home and his office (Pet. App. iv; R. 38, 39-40). The deductions were disallowed; petitioners' duly filed claims for refund were rejected; and an action for refund was brought (Pet. App. i-ii).

At the trial before a jury, the evidence disclosed that the petitioners acquired the property in 1949 or 1950, that there were then elm trees growing on the property, and that they planted more (R. 39-40). Phloem necrosis appeared in Champaign County, Illinois, in the early 1950's (R. 24-25), and it has spread west along the 40th parallel from the Appalachian Mountains to the State of Kansas (R. 88). Phloem necrosis is a virus which is carried by an insect called a leaf hopper. The insect, after feeding on

the leaves of an infected tree and sucking up its sap, moves on to a healthy tree into which it injects the virus while feeding on its leaves. The virus then flows down the tree to infect the roots, kills them, and then flows back up the tree as the sap rises and infects all parts thereof. It enters and kills the phloem of the tree, the woody connective tissue just beneath the bark (R. 27-28, 50).

There was evidence that the bite of one leaf hopper carrying the virus was sufficient to infect an elm tree and that an infected tree inevitably died from the disease since there was no known way to kill the virus or to cure an infected tree (R. 28, 35, 79, 89). Control of the disease involved controlling the activities of the leaf hopper by spraying, but spraying had proven to be ineffective in practice (R. 31-32, 59-60). There were differences in the evidence as to how soon death occurred after infection. Two witnesses stated that the interval between infection and the first sign of symptoms was about a year (R. 33, 74-75), but there was also testimony from which the jury could have concluded that infection produced death in a month (R. 53).

The jury returned a verdict for the petitioners and the district court denied the government's motion for judgment notwithstanding the verdict and entered judgment on the verdict (R. 17-19.) The court of appeals reversed, holding that the losses attributable to the death of the elm trees of the petitioners were not casualty losses within the meaning of Section 165 (c) of the Internal Revenue Code of 1954 as a matter of law (Pet. App. v-vi).

ARGUMENT

There is no conflict, and the result reached by the court of appeals is correct.

1. The petitioners point to no court of appeals decision which directly conflicts with the decision of the court below. Rather, they contend that the court of appeals departed from the commonly accepted definition of a casualty when it relied upon foreseeability alone in holding that the deaths of their elm trees did not constitute casualty losses (Pet. 7-8).

The general loss deduction provided by Section 165 of the 1954 Code, *supra*, is limited, in the case of individuals, to uncompensated losses incurred in a trade or business or in a transaction entered into for profit, or arising from "fire, storm, shipwreck, or other casualty, or from theft." The 1954 Code provides no definition of the term "casualty" and there is no legislative history indicating the intent of the Congress which first introduced the phrase "other casualty" into the revenue laws as Section 5(a) Fourth of the Revenue Act of 1916, c. 463, 39 Stat. 756. Accordingly, the courts have relied upon the usual devices of statutory interpretation, such as the rule of *ejusdem generis* and dictionaries, in order to determine whether or not a given loss was in fact produced by a "casualty". Generally, that term has been equated with "accident" and confined to events having the characteristics of being sudden, unexpected, and unusual.[2]

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[2] In another context, this Court has noted that "An accident or casualty, according to common understanding, pro-

Petitioners contend that under the accepted test these characteristics or factors are applicable in the disjunctive (Pet. 7-8). Opinions of some courts of appeals have treated them conjunctively,[3] others disjunctively.[4] None reflects a concern for conjunctivity or disjunctivity. An examination of the decisions indicates that the presence or absence of one or more of these characteristics and the relative weight accorded to them have varied with the nature of the event relied upon as constituting a casualty and the property on which it acted.

Thus, in *Matheson* v. *Commissioner*, 54 F. 2d 537, the Second Circuit found no casualty where the corrosion and rusting of the reinforcing bars of a building's concrete floor beams were due to the ordinary action of the elements rather than to a serious storm, cataclysmic operation of the elements, or serious injury to the foundation. The Ninth Circuit, in *United*

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ceeds from an unknown cause or is an unusual effect of a known cause. Either may be properly said to occur by chance and unexpectedly." *Chicago &c. Railroad Co.* v. *Pullman Car Co.*, 139 U.S. 79, 86.

[3] *United States* v. *Rogers*, 120 F. 2d 244, modified on rehearing, 122 F. 2d 485, 490 (C.A. 9th); *Tank* v. *Commissioner*, 270 F. 2d 477, 482 (C.A. 6th); *Burns* v. *United States*, 174 F. Supp. 203 (N.D. Ohio), affirmed *per curiam*, 284 F. 2d 436 (C.A. 6th). See also *Bercaw* v. *Commissioner*, decided January 21, 1947 (P-H Memo T.C., par. 47,005), affirmed on other issues, 165 F. 2d 521 (C.A. 4th).

[4] *Matheson* v. *Commissioner*, 54 F. 2d 537 (C.A. 2d); *Rosenberg* v. *Commissioner*, 198 F.2d 46 (C.A. 8th), acquiescence withdrawn, Rev. Rul. 63-232, 1963-2 Cum. Bull. 97; *Levy* v. *Commissioner*, 212 F. 2d 552 (C.A. 5th).

States v. *Rogers*, 120 F. 2d 244, modified on rehearing, 122 F. 2d 485, 490, found no casualty loss where the damage was due to termites or dry rot since the term "casualty" included a sense of suddenness and termite or dry rot damage was a development occurring over a long period of time. In another termite case, the Second Circuit agreed with the *Rogers* decision, noted that its own decision in *Matheson* v. *Commissioner*, *supra*, was in accord, and denied a claim for a casualty loss deduction. *Fay* v. *Helvering*, 120 F. 2d 253. Thereafter, the Eighth Circuit allowed a casualty loss deduction for termite damage by finding that the circumstances were unusual in that the damage had proceeded in a relatively short period of time. *Rosenberg* v. *Commissioner*, 198 F. 2d 46, acquiescence withdrawn, Rev. Rul. 63-232, 1963-2 Cum. Bull. 97.

In a case very similar to the case at bar, the Sixth Circuit affirmed the judgment of the district court denying a deduction for loss due to the death of an elm tree by reason of Dutch Elm disease. The district court had concluded that the action of the disease was progressive. *Burns* v. *United States*, 174 F. Supp. 203 (N.D. Ohio), affirmed *per curiam*, 284 F. 2d 436 (C. A. 6th). On the other hand, the Sixth Circuit also allowed a casualty loss deduction for damage to a house caused by the slippage of the riverbank on which it stood. In that instance, it held the slippage to be both unusual and unforeseen. *Tank* v. *Commissioner*, 270 F. 2d 477. In *Levy* v. *Commissioner*, 212 F. 2d 552, the Fifth Circuit denied a casualty loss deduction for payments made to repair a sagging

roof; the taxpayers, lessees of the building, had been aware of the defective condition for some time. It appears that this was an alternative holding, as the court also held that the payments constituted capital expenditures and that the taxpayers had a right of reimbursement against their lessor.

Obviously, any test which might be formulated for determining a casualty for the purposes of Section 165(c) must do service for a variety of factual situations. The standard thus far developed by the courts of appeals is necessarily imprecise; its application to a given case is a matter of degree and judgment.

2. The result reached by the court below is correct; death from disease does not constitute a casualty as a matter of law. To be contrasted with those events which possess the hallmarks of a casualty are those which may be deemed usual and expected in the nature of things. Thus, destruction of property through the normal action of the elements is not a casualty loss. In *Matheson* v. *Commissioner*, 54 F. 2d 537 (C. A. 2d), it was held that losses caused by corrosion and rusting were not casualty losses because they were due only to the ordinary action of the elements. By the same token, death resulting from disease is not a casualty loss. Such an occurrence is one of those events which all owners of plants and animals must expect in the normal course of things; in common parlance, it is not regarded as an accident.

The petitioners point to no decision which holds that the loss of plants or animals through death from disease is a casualty loss. The Tax Court and the

Commissioner of Internal Revenue have ruled to the contrary. *McMorran* v. *Commissioner*, decided March 20, 1939 (P-H Memo B. T. A., par. 39,117) (horse); Rev. Rul. 57-599, 1957-2 Cum. Bull. 142 (phloem necrosis) (Appendix, *infra*). Cf. I. T. 3696, 1944 Cum. Bull. 241; Rev. Rul. 54-395, 1954-2 Cum. Bull. 143; Rev. Rul. 61-216, 1961-2 Cum. Bull. 134 (involuntary conversions). The decision relied upon by the petitioners (Pet. 13) held that the loss of sheep through disease was a deductible loss where they had been purchased in a transaction entered into for profit. *Marshall* v. *Commissioner*, decided February 14, 1941 (P-H Memo B. T. A., par. 41,112), affirmed, 128 F. 2d 741 (C. A. 6th), certiorari denied, 317 U. S. 657. See Section 165(c)(2), *supra*.

Indeed, in a case involving the loss of an elm tree through death from Dutch Elm disease, the district court held that loss occasioned by disease, however contracted, was not a casualty within the meaning of the statute. *Burns* v. *United States*, 174 F. Supp. 203 (N.D. Ohio), affirmed *per curiam*, 284 F. 2d 436 (C. A. 6th). The court noted (174 F. Supp., p. 210):

> There is nothing sudden, unusual or unexpected for a bettle (or any other insect) to feed on a tree, or to deposit its eggs underneath the bark in the tree lining or to act as a carrier of disease or for the tree to become infected with disease and die in consequence thereof. *These are everyday occurrences of nature.* [Italics added.]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH, 1965.

APPENDIX

Rev. Rul. 57-599, 1957-2 Cum. Bull. 142:

Advice has been requested whether, under section 165(c) of the Internal Revenue Code of 1954 or section 23(e)(3) of the Internal Revenue Code of 1939, an allowable deduction as a casualty loss arises when otherwise apparently healthy elm trees are lost either by the disease "phloem necrosis" or by an attack of insects.

In the instant case five trees leafed out in early spring in apparent good health and so continued until summer when the bark began to split open. Within a few days the trees died. The cause of death was attributed to the disease "phloem necrosis." Four other trees, in healthy condition on July 1, were attacked by insects shortly thereafter and were dead by July 10, of the same year.

Section 165(c) of the 1954 Code and section 23(e)(3) of the 1939 Code provides, in part, for a deduction from income of losses arising from fires, storms, shipwreck, or other casualty.

In the case of *Ray Durden et al.* v. *Commissioner*, 3 T. C. 1, acquiescence C. B. 1944, 8, the court held that the definition of "other casualty" excludes the progressive deterioration of property through a steadily operating cause. Also see, *Hugh M. Matheson et al.* v. *Commissioner*, 54 Fed. (2d) 537, Ct. D. 510, C. B. XI-2, 393 (1932) and *Charles J. Fay* v. *Helvering*, 120 Fed. (2d) 253.

Similarly, the court held in the case of *Betty Rogers et al.* v. *Commissioner*, 120 Fed. (2d) 244, that the word "casualty" denotes an accident, a mishap, or some sudden invasion by a hostile agency, and excludes the progressive deterioration of property

through a steadily operating cause. Since damage by termites is not a sudden occurrence, but is a development over a longer period of time, the loss resulting therefrom is held not to be a casualty. Also, see Rev. Rul. 79, C. B. 1953-1, 41 and *Harry Johnston Grant* v. *Commissioner*, 30 B.T.A. 1028, acquiescence C. B. XIII-2, 8 (1924).

The very nature of the disease phloem necrosis indicates that the loss arises through a progressive deterioration rather than a sudden occurrence. "Necrosis" is defined in Webster's New International Dictionary (Second Edition) in part as follows:

2. * * * A localized or general death of plant tissue caused by low temperatures, fungi, etc. * * *.

The lack of suddenness is also present where the loss of trees is a result of insect infestation. While it may be true that the arrival of the insects is sudden the death of the tree is the result of progressive deterioration.

In view of the above, it is held that a loss arising from the death of trees as a result of disease or attack by insects does not constitute an allowable deduction as a casualty loss within the meaning of section 165(c) of the 1954 Code or section 23(e)(3) of the 1939 Code.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 898.

JOHN ALAN APPLEMAN and JEAN G. APPLEMAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the Seventh Circuit.

REPLY BRIEF FOR APPELLANT.

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The Government has managed in an excellent fashion to solve the case by assuming the answer it is trying to reach. No, it says, phloem necrosis can not be a casualty because no disease can be a casualty. After all, it is expected. And in so making that statement, it ignores its own admissions that the test of a casualty loss depends on the factual circumstances of the case.

For example, termite losses are fairly common. The yellow pages of any city directory indicate the vast business performed by exterminators. Yet, if the loss is sudden it will still be a casualty loss (Rosenberg v. Commissioner, C. A. 8, 198 F. 2d 46; Shopmaker v. United States,

D. C. Mo., 119 F. Supp. 705; Buist v. United States, D. C. S. C., 164 F. Supp. 218; E. G. Kilroe, 32 T. C. 1304; Henry F. Cate, Jr., 21 T. C. M. 1146; and Alan M. Winsor, 18 T. C. M. 383)—even the Government admitted this until it lost the present case in the trial court.

In our first brief, we spoke of the numerous types of losses which have been held to be casualty losses; damages caused by flood, drought, sonic boom, automobile accident, vandalism, and occupation by troops among others. The Government at no place attempted to explain how these varied so greatly from losses caused by an epidemic carried by an insect, that the latter could be excluded, as a matter of law, from the class of casualties.

Moreover, the Government speaks, at page 7 of its brief, of the *Burns* case (174 F. Supp. 203, affirmed per curiam, 284 F. 2d 436) as being "very similar." How? That case dealt with a curable disease; ours was one which is, as admitted in the Government's brief, incurable and incapable of being prevented. One is sudden, as was found by the jury; the other, Dutch Elm Fungus, is slow to kill and easy to arrest. The court may or may not have been right in holding that such a fungus did not create a casualty loss, but, certainly, its dictum, in saying that any loss occasioned by disease is not a casualty loss, was not called for by the facts of its case. It was there suggested that there is nothing unusual in a tree dying from disease—perhaps not, but it is most unusual for all of one's trees, when there are so many, to be suddenly killed in an epidemic which one is incapable of preventing.

The term disease, as pointed out on page 13 of our Petition for Writ of Certiorari, is a general term. It merely refers to any morbid change in a tissue or abnormal state of a body. It could as easily apply to the state of a tree dying from lightning as to one dying from phloem necrosis. Indeed the two instances are parallel. In both, the

death of the tree is caused by a sudden strike; the tree then quickly rots away. And the same appellation could be applied to death from blizzard or drought. But the mere fact that a blizzard causes a tree to die from disease or that a drought causes a tree to die from disease has not been held to alter the applicability of the normal test of casualty. Those tests have never been, what caused the casualty but what was the nature of the loss—was it sudden, unusual or unexpected. Unfortunately, war losses are common today; so are those caused by automobile accidents. Yet, they are casualty losses. To generalize is always dangerous, yet this is exactly what both the Government and the *Burns* case have done. And to generalize here is to defeat the purpose of Congress, which was, seemingly, to protect taxpayers against costly, sudden, and unexpected losses, particularly when unavoidable, regardless of any arbitrary appellation.

There is one further statement in the Government's brief that should be modified. There is a suggestion that casualty should simply be equated with accident. But droughts are not accidents; a freeze is not an accident; a gradual (five-year) sinking of soil is not an accident (nor is it sudden); occupation of troops is not an accident. Yet these have all been held to create casualty losses. Buttram v. Jones, D. C. Okla., 87 F. Supp. 322; United States v. Barret, C. A. 5, 202 F. 2d 804; Harry Johnston Grant, 30 B. T. A. 1028, Acq. XIII-2 C. B. 8; Charles Gutwirth, 40 T. C. 666 at 679, 680. The equation of casualty with accident is indeed unfortunate and may explain the confusion over the term "disease." For throughout the years, words "disease" and "accident" have been juxtaposed as contrasting terms. This Court will remember the great battles fought over whether sunstroke was an accident or a disease (see 1 A Appleman *Insurance Law and Practice*, § 447). But such conflict does not exist between "casualty" and "disease" per se. If the "disease" was sudden, unusual, or unexpected, it could still be a casualty

and, even in layman's parlance, epidemics are often thought of as casualties.

The jury determined that the sudden wiping out of all the trees had all the earmarks of a casualty. And the Government in appealing did not object to the finding of the jury nor did it claim that the findings of the jury were manifestly contrary to the weight of the evidence. It has merely claimed that considering only the evidence favorable to the plaintiff and not weighing conflicting evidence, the case should not have gone to the jury at all. The Government asserted, rather, that such a loss could never be unexpected. This seems hard to believe when in 1952, just four years before the losses, the disease was unheard of at a leading school in plant pathology, the University of Illinois, as Mr. Bennett testified. The Government states that the appellants have cited no cases to support their position that a loss caused by "disease" can be a casualty; but neither has the Government cited any holding that a loss, unusual, sudden, unexpected, and incapable of being prevented is automatically excluded from the class of casualty losses merely because the appellation "disease" could be applied to it.

We believe that the other courts are correct in holding that the nature of a casualty depends on the facts and not on terms and that the same type of loss might be a casualty or not, depending on, principally, whether or not it was sudden. Compare United States v. Rogers, C. A. 9, 120 F. 2d 244, modified on rehearing, 122 F. 2d 485; Fay v. Helvering, 120 F. 2d 253, Rosenberg v. Commissioner, C. A. 8, 198 F. 2d 46; E. G. Kilroe, 32 T. C. 1304; Shopmaker v. United States, D. C. Mo., 119 F. Supp. 705; Buist v. United States, D. C. S. C., 164 F. Supp. 218; Henry F. Cate, Jr., 21 T. C. M. 1146; Alan M. Winsor, 18 T. C. M. 383; Rev. Rul. 59-277, C. B. 1959-2, 73. To change horses now and place all emphasis on unforeseeability is to remove most would-be casualty

losses such as landslides, earthquakes, drought, and blizzards from this class. For this reason, we ask for the court to accept and reverse this case.

Respectfully submitted,

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Proof of Service.

I, John Alan Appleman, one of the attorneys for John Alan Appleman and Jean G. Appleman, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 19 day of March, 1965, I served copies of the foregoing On Petition for Writ of Certiorari to the Court of Appeals of the Seventh Circuit, Reply Brief for Appellant, on the United States by mailing copies in duly addressed envelopes, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C., 20530 and to J. Edward Shillingburg, Esq., Department of Justice, Washington, D. C. 20530.

.....

John Alan Appleman.